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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1953

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**No.**

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**JULIA THOMPSON,**  
*Petitioner,*

VS.

**RICHARD P. LAWSON,**  
As Deputy Commissioner of the United States  
Bureau of Employees' Compensation, Sixth  
Compensation District, et al.,  
*Respondents.*

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**ON PETITION FOR WRIT OF  
CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH  
CIRCUIT**

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**BRIEF FOR RESPONDENTS  
GULF FLORIDA TERMINAL COMPANY,  
INCORPORATED,  
and  
AMERICAN MUTUAL LIABILITY INSURANCE  
COMPANY  
IN OPPOSITION**

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*Of Counsel:*  
**MACFARLANE, FERGUSON,  
ALLISON & KELLY,**  
Tampa, Florida

**GEORGE W. ERICKSEN,  
ARTHUR A. SIMPSON,**  
*Attorneys for Respondents*  
**Gulf Florida Terminal  
Company, Incorporated, and  
American Mutual Liability  
Insurance Company,**  
P. O. Box 1531  
Tampa, Florida

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Opinions Below

No opinion was rendered by the District Court.  
The opinion of the Court of Appeals (R 22 et seq.) is  
not yet reported.

## Jurisdiction

The judgment of the Court of Appeals was entered June 30, 1953. The petition for a writ of certiorari was filed September 28, 1953, but not served on these respondents until October 26, 1953. The jurisdiction of this Court has been invoked by petitioner under 28 USC Section 1254(1).

### RESTATEMENT OF THE QUESTION PRESENTED

We contend that the question as presented by the petitioner ignores one step in the proceedings; and, consequently, infers a conflict of decisions where none actually exists.

The Deputy Commissioner in this workmen's compensation case found against the claimant-petitioner, and in so finding determined as an ultimate fact that the claimant—

“ . . . was not living apart from Otis Thompson (the deceased employee) for justifiable cause or by reason of his desertion at the time of his death.”  
(R 11) ;

and consequently was not a widow<sup>(1)</sup> entitled to dependency benefits under the Act<sup>(2)</sup>.

The Deputy Commissioner's determination of such non-jurisdictional facts is not to be disturbed on appeal if supported by evidence<sup>(3)</sup>.

(1) As defined in Section 902(16), Title 33, United States Code.

(2) Longshoremen's and Harbor Workers' Compensation Act, Title 33, USC, Sections 901-950.

(3) *Associated Operating Co. v. Lowe*, 52 F. Supp. 550, 552, aff'd per curiam, 138 F. 2d 916, cited by petitioner, pp. 4, 6 of petition; *Crowell v. Benson*, 285 US 22, 46; 76 L. Ed. 598, 608; *Cardillo v. Liberty Mutual Insurance Co.*, 330 US 469, 477-478; 91 L. Ed. 1028, 1036.

Consequently, the real question is:

According to the Deputy Commissioner's findings the weight to which they are entitled as a matter of law, was there any evidence to support the ultimate finding that the claimant "was not living apart from Otis Thompson for justifiable cause or by reason of his desertion at the time of his death"?

### STATUTE INVOLVED

The statute involved is the Longshoremen's and Harbor Workers' Compensation Act, Sections 901-950, Title 33, United States Code.

Section 902(16) defines the term "widow" as follows:

"The term 'widow' includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time."

The Sections of the Act determining the finality of the Deputy Commissioner's findings of fact are Section 919, Subsection (a), and Section 921, Subsection (b) (*Cardillo v. Liberty Mutual Insurance Co.*, 330 US 469, 477), the pertinent portions of which are as follows:

*Section 919(a):*

"Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim."

*Section 921(b):*

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the District Court of the United States for the District of Columbia if the injury occurred in the District)."

**STATEMENT OF THE CASE**

In commenting on and supplementing the petitioner's statement, we first call the Court's attention to the failure of the petitioner to bring up the record in the hearing before the Deputy Commissioner. Consequently, the facts in the case are those contained in the Deputy Commissioner's Findings of Fact, pp. 7-11 of the transcript of record.

The petitioner's elliptical treatment of those facts has ignored at least one finding which we feel was important to the decision of the case—

"... that Julia Thompson did not have any intentions of ever living with Otis Thompson and resuming the relationship of husband and wife . . ." (R 10).

On the basis of this and other findings, the Deputy Commissioner determined that, as of the time of the death of Otis Thompson, the employee, the petitioner Julia Thompson was living apart from him, not by reason of any prior act of his, but by virtue of her own voluntary decision to live apart from the decedent.

## ARGUMENT

As we understand the question actually involved in this case, the District Court and the Court of Appeals could not have reversed the Deputy Commissioner's determination of fact, because there was abundant underlying support for that determination in the record which the petitioner presented for consideration by the courts.

### FINDINGS OF DEPUTY COMMISSIONER WERE SUPPORTED BY EVIDENCE

The petitioner here (claimant-appellant below) did not bring up the record in the proceedings before the Deputy Commissioner. Consequently, her argument against the Deputy Commissioner's finding is necessarily limited to the allegation that the detailed specific findings, which we must assume were sufficiently supported by evidence, did not warrant the factual conclusion drawn by the Deputy Commissioner. He found—

“ . . . at a time approximately three weeks before his injury on June 7th, 1951, Otis Thompson called upon Julia Thompson at the home of their daughter Lucille; that during the time of that visit Otis Thompson asked Julia Thompson if she would ‘take him back’ and Julia Thompson refused; that Julia Thompson did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife; that at the time of his injury and death the claimant, Julia Thompson, was the lawful wife of Otis Thompson; that from November 1925 until June 1940 the claimant, Julia Thompson, was living apart from Otis Thompson by reason of his desertion; that Julia Thompson was not living apart from Otis Thompson at the time of his death for justifiable cause or by reason of his desertion . . . ” (R 10)



There was no series of similar, uncontroverted findings in any of the cases cited by petitioner as being in conflict with the instant case. As a matter of fact, all of those cases rely either on the absence of such findings or on contrary findings. Briefly reviewing them, it is apparent that as to the principal proposition of the weight to be given to a Deputy Commissioner's determination, they are in accord, and not in conflict, with the instant case:

*Associated Operating Co. v. Lowe*, 52 F. Supp. 550, 551, aff'd per curiam 138 F. 2d 916, CA 2, 1943.

Deputy Commissioner's order and findings *upheld*.

"The finding, that the said defendant was living apart from the deceased, for justifiable cause, if as I believe was a finding of fact, is as a fact supported by the evidence, and should not be disturbed, . . ." (at p. 552)

*Moore Dry Dock Co. v. Pillsbury*, 169 F. 2d 988, CA 9, 1948.

Deputy Commissioner's order *upheld*. No findings of applicable fact by Deputy Commissioner. It was found either by Court or Commissioner that at all times after original desertion by deceased, "claimant lived apart from decedent by reason of his desertion." (at p. 989).

*Travelers Ins. Co. v. Norton*, 34 F. Supp. 740, DC, ED Pa. 1940.

Deputy Commissioner's order and findings *upheld*.

"The commissioner's award was predicated upon the finding that Pauline S. Peterson, the deceased's lawful wife, at the time of his death was living apart from him for justifiable cause and by reason of his desertion." (at p. 742)

"Jurisdictional facts not being involved in the foregoing findings, if supported by competent evidence they must be upheld." (at p. 741).

Completing the analysis, the above cases hold that:

- (1) The Deputy Commissioner's findings that the claimant was not, at the time of decedent's death—

- (a) living apart from decedent for justifiable cause, or

- (b) by reason of his desertion;

will not be disturbed if there is evidence to support them; and

- (2) In particular, the courts will not disturb those findings merely because of evidence of intervening immoral acts on the part of the claimant.

The instant case is merely the opposite side of the same coin. The Deputy Commissioner found that the claimant failed to prove her case<sup>(4)</sup> that she was within the statutory requirements at the time of the decedent's death. She failed, in part at least, because of positive evidence that—

"... at a time approximately three weeks before his injury on June 7th, 1951 . . . Otis Thompson asked Julia Thompson if she would 'take him back' and Julia Thompson refused; that Julia Thompson did not have any intentions of ever again living with Otis Thompson and resuming the relationship of husband and wife . . ." (R 10).

(4) In Workmen's Compensation cases the burden of proof is on the claimant. *In re Fierro's Case*, 111 NE 957, Mass., 1916; *Green v. Crowell*, 69 F. 2d 762, CA 5, 1934, cert. den. 293 US 554.

These facts have nothing to do with Julia Thompson's morality while living apart from Otis Thompson. They do answer the question—

Did Julia Thompson's involuntary separation from the decedent in November 1925, for which she had justifiable cause by reason of his desertion, become *voluntary* by reason of subsequent events?

The answer is that it did<sup>(5)</sup>; and the Deputy Commissioner correctly so found.

We respectfully submit that there is no conflict in law between this case and those of the ninth, third and second circuits cited by petitioner. As the decision in this case by the Court of Appeals points out, the fact

- (5) Compare findings and conclusion in *Broadbent's Case*, 134 NE 632, 634-635, Mass. 1922, where failure to accede to husband's request that wife accompany him to matrimonial domicile was held to demonstrate lack of present justifiable cause. Our reference to Massachusetts cases arises out of the adoption by Congress in 1927 in the Longshoremen's & Harbor Workers' Act of the phraseology of the Massachusetts Workmen's Compensation Law, St. 1911 c. 751, part 2, § 7, as amended by St. 1914, c. 708, § 3. Pertinent provisions are:

"§32. (a) A wife upon a husband with whom she lives at the time of his death, or from whom, at the time of his death, the department shall find the wife was living apart for justifiable cause or because he had deserted her. The findings of the department upon the questions of such justifiable cause and desertion shall be final."

Outside of a few other New England states, such as Rhode Island, Vermont and Maine, and Michigan, the dependency provisions of the earlier acts in other states were different from the Federal Act. While, in general, the Federal Act followed the New York Workman's Compensation Act (*Hartford Accident & Indemnity Co. v. Hoage*, 85 F. 2d 411, CA, DC, 1936, at p. 413) in respect to this dependency definition it follows Massachusetts. However, the same rule of construction, that Congress will be deemed to have adopted earlier judicial constructions of borrowed state legislation, applies. E.g., Massachusetts cases were cited in *Weeks v. Behrend*, 135 F. 2d 258, CA DC.

to be decided is set up by the statute, which requires a determination of the purpose in the wife's living apart as of the date of decedent's death. The Deputy Commissioner must fit the facts of each case into the ultimate statutory fact.

Under these circumstances, in one case the intervening acts of the wife—whether moral, amoral or immoral—may demonstrate that she would never again, regardless of the urgency of the decedent's invitation, resume the husband-wife relationship. If so, the fault, originally his, now becomes hers. That is the instant case.

In a precisely similar case, the intervening acts of the wife—however immoral—may fail to demonstrate that the choice of living apart is now her decision, not his. Those are the third, second and ninth circuit cases.

We believe that future cases should continue to be resolved on such factual bases by the Deputy Commissioner, and that the petitioner's efforts to place such determinations in a "conclusion of law" strait-jacket should fail.

### **LOCAL LAW OF DIVORCE NOT APPLICABLE**

Although the conflict of decisions on which the petitioner relies as a reason for granting the writ is absent, there is a conflict in basic legal propositions within the petition itself.

On page 4 of the petition, the argument is made that there should be a uniformity of interpretation of the Longshoremen's and Harbor Workers' Compensation Act throughout the United States; and on pages

6 and 7, the petition takes the contrary position that definitions of desertion in the local law of divorce should control the factual determination.

Without discussing the anomaly of this position in detail, we deem it to have been decided that:

- (1) The determination of the *marriage* status will be resolved under local law, absent a more complete definition in the Federal Act. *Green v. Crowell*, 69 F. 2d 762, CA 5, cert. den. 293 US 554; *Bolin v. Marshall*, 76 F. 2d 668, cert. den. 296 US 573. That must be so because the Federal Act in this respect depends on a *legal* relationship, that of husband and wife, which necessarily depends on the law of the state where it is claimed to exist.
- (2) The determination of "desertion" and "justifiable cause" is *factual*, and although they may have acquired peculiar meaning as words of legal art, they are not dependent on the local law of divorce for their meaning. *In re Newman's Case*, 111 NE 359, 361, Mass., 1916. Furthermore, as we have previously pointed out, if a guide to the application of those words to particular factual situations is necessary, the courts would naturally look for definitions to the jurisdiction from which they were borrowed (Massachusetts) and not to the local law of the action. *Hartford Accident & Indemnity Co. v. Hoage*, 85 F. 2d 411, 413, CA DC, 1936; *Marshall v. Andrew F. Mahony Co.*, 56 F. 2d 74, 77, CA 9, 1932.

## CONCLUSION

We contend that on adequate analysis, the cases in the courts of appeals, which petitioner contends are in conflict, are actually in agreement on basic legal propositions; and that, therefore, the basic reason advanced by petitioner for granting the writ fails. The petition for writ of certiorari should be denied.

GEORGE W. ERICKSEN,  
ARTHUR A. SIMPSON,

*Attorneys for Respondents*

Gulf Florida Terminal Company,  
Incorporated, and American  
Mutual Liability Insurance  
Company,

P. O. Box 1531  
Tampa, Florida

*Of Counsel:*

MACFARLANE, FERGUSON,  
ALLISON & KELLY,  
Tampa, Florida